

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF HUNTINGTON BEACH,

Plaintiff and Respondent,

v.

HUNTINGTON BEACH FIREFIGHTERS'
ASSOCIATION et al.,

Intervenors and Appellants.

G027686

(Super. Ct. No. 779958 consolidated
with 794230)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William F. McDonald, Judge. Affirmed.

Silver, Hadden & Silver and Stephen H. Silver for Intervenors and Appellants.

Liebert Cassidy, Liebert Cassidy Whitmore, Peter J. Brown and Steven M. Berliner for Plaintiff and Respondent.

I. Introduction

The Huntington Beach Firefighters' Association, The Huntington Beach Police Management Association, and the Huntington Beach Police Officers' Association (Intervenors) intervened in this action by the City of Huntington Beach against the Board of the Public Employees' Retirement System (PERS). The Intervenors sought to compel the

City to provide retirement enhancements to those employees who did not exercise their options to convert benefits to salary during the period of time specified in PERS' Short-term Policy. Although subsequent amendments to the Public Employees' Retirement Law (PERL) eliminated the option to convert benefits to salary that existed under the Short-term Policy, the Intervenor claim the employees acquired a vested right to the enhanced benefits. Accordingly, they argued the City must provide these enhanced benefits by either following the new procedures in Government Code section 20692 for benefit conversions, or by purchasing an annuity to subsidize equivalent enhancements.

The Intervenor's causes of action were disposed of by demurrer and summary judgment. On appeal, the Intervenor contend that the trial court erred in failing to consider evidence, which, they claim, demonstrates that the true intent of the parties during labor negotiations was to provide enhancements in any lawful form rather than merely through benefit conversions. We affirm.

II. *Background of PERS' Short-Term Policy*

PERS, a retirement system for employees of the state of California and participating local public agencies, was established by the Public Employment Retirement Law (PERL) (Gov. Code, § 20000 et seq.).¹ PERS is a prefunded, defined benefit plan that determines an employee's retirement benefit based on retirement age, length of service, and final compensation. (*Oden v. Board of Administration of PERS* (1994) 23 Cal.App.4th 194, 198 (*Oden*)). PERS is funded by both employer and employee contributions. Employee contribution rates are fixed by statute; employer contribution rates, on the other hand, are determined by compensation figures and actuarial assumptions,

¹ All statutory references are to the Government Code unless otherwise specified. This case involves the PERL as it existed before it was amended by the passage of Senate Bill 53 (Stats. 1993, Ch. 1297), effective July 1, 1994. Subsequently, in 1995, the PERL was reorganized and renumbered.

and are adjusted periodically by PERS. (*Hudson v. Board of Administration of PERS* (1997) 59 Cal.App.4th 1310, 1316.)

Under the Internal Revenue Code, employers' contributions are not taxable income to the employee until PERS benefits are paid upon separation or retirement, whereas employees' contributions are ordinarily taxable when made but not taxed at disbursement of benefits. Once contributions are designated as employee contributions, they are "generally forbidden from being favorably treated as employer contributions under federal tax law. (26 U.S.C. § 414(h)(1).)" (*Oden, supra*, 23 Cal.App.4th at p. 199.) An exception has been created, however, for state and local governmental employers so that "designated employee contributions to a qualified governmental pension plan are treated as tax deferred employer contributions where the employer 'picks up' the employee contributions. (26 U.S.C. § 414(h)(2).)" (*Ibid.*) This "pick up" law allows PERS to treat contributions as employee contributions under state retirement law and allows the employee to treat the contributions as employer contributions for purposes of federal tax law. (*Ibid.*)

"Employees' contributions to PERS are currently made in two primary ways: (1) employee-paid salary deduction; and (2) employer-paid salary addition. In the first method, a pension contribution is withheld from the employee's stated salary. . . . The employee pays income tax on his reduced wages, less the amount of the pension contribution. [Citation.] In the second method, the employer directly picks up and assumes the pension contribution, 'topping up the total compensation so that the employee then receives his full stated salary without a deduction for pensions.' [Citation.] The employee pays income tax on his stated salary; he does not pay tax on the pension contribution." (*Oden, supra*, 23 Cal.App.4th at pp. 199-200.)

While both methods of paying employees' contributions are "pick ups" under federal law, PERS has generally distinguished between the two methods when determining compensation under state retirement law, treating employee-paid salary deductions as

compensation while excluding employer-paid salary additions from compensation under former section 20022, subdivision (b)(6). But PERS recognized an exception for some public agencies that stipulated in collective bargaining agreements to report employer-paid contributions as compensation. (*Oden, supra*, 23 Cal.App.4th at pp. 200-201.)

In the late 1980's, PERS realized that benefit conversions were being used extensively to increase final compensation, thereby creating a large unfunded liability to the system because employees were retiring throughout the state with final compensation exceeding their funded retirement benefit. PERS advised its members that while the PERL did not preclude these arrangements, PERS was "opposed to any arrangement which inflates final compensation over and above what normally would be expected." (*Hudson v. Board of Administration of PERS, supra*, 59 Cal.App.4th at p. 1325.) By 1992, the problem had worsened, and PERS formally took the position "that final year conversions of benefits to salary were not to be reported as compensation for retirement purposes." (*Id.* at p. 1323.) It brought the problem to the attention of the Legislature and ultimately sponsored Senate Bill 53, which amended the PERL to add benefit conversions to the definition of final settlement pay, thus eliminating them from compensation under most circumstances. (*Ibid.*)² In the meantime, PERS adopted a short-term policy to deal with the unfunded liability problem.

² The 1993 legislation allows an agency that has been paying its employees' contributions to enter into an agreement to stop paying those contributions during the final compensation period and instead increase the payrate of the employees by an equal amount, thus enhancing the retirement benefits. An agency must amend its contract with PERS to reflect its election to be subject to this provision, and by doing so it agrees to fund the additional benefits according to a prescribed formula. An agency cannot adopt the amendment to its PERS contract until it has held two public meetings disclosing the additional cost and the proposed source of funding. (Current § 20692.)

When signing Senate Bill 53, Governor Wilson remarked, "The bill represents a comprehensive attempt to eliminate pension abuse in the nearly 1,700 cities, counties, and special districts. [¶] The otherwise worthwhile reforms in this bill are marred by the inclusion of one egregious provision, which allows employer-made member contributions to be considered compensation for the purposes of calculating retirement benefits. Were it not for the fact that this provision is only an optional benefit and only implemented on a pre-funded basis after two public meetings of the local government body, I would have taken different action. [¶] But, since the reforms in this bill are mandatory and the offending provision is optional under local collective bargaining, I have signed this bill."

The short-term policy was adopted on December 18, 1992. It provided that from December 18, 1992 through June 30, 1994, compensation would include conversions of employer-paid member contributions, unearned vacation, and sick leave if provisions for such conversions were included in a labor agreement on the day of adoption. The policy empowered the Board to “use the basic principles of estoppel to approve other types of compensation provided to members through written labor agreements, except that individual detriment need not be proven if such agreements or provisions are the result of a misunderstanding of fact or based on written communication from the Board which includes PERS Circular Letters.” The policy required the employing agency to pay for any unfunded liability to PERS resulting from the conversions.

III. The Complaint in Intervention

During the early 1990’s, the City and its employee associations entered into memoranda of understanding (MOU’s) which gave the employees the opportunity during any one year to enhance their pensions by converting the value of employer-paid member contributions and up to one year of unused vacation time to salary. Some employees could also convert their automobile allowances. In January 1993, after PERS adopted the Short-term Policy, the City issued a memo to all its employees explaining the Short-term Policy and urging them to consider taking advantage of the limited opportunity to enhance their final compensation. Many employees did so, trading these benefits for increased salary payments for a 12-month period. The benefits were extinguished for that period of time; the employees actually received the increased salary and paid taxes on it. The City reported the increased salary to PERS as compensation earnable and it paid to PERS all attendant employer and employee retirement contributions.

Subsequently, the City challenged the legality of the Short-term Policy and PERS’ bills for the cost of the enhanced retirement benefits. In 1997, it filed an action against PERS. Three of the employee associations, Huntington Beach Firefighters’ Association, Huntington Beach Management Employees’ Organization, and Huntington

Beach Municipal Employees' Association, filed a complaint in intervention, denying the allegations in the City's complaint and requesting affirmative relief against the City and PERS. The complaint in intervention sought damages for breach of contract, reformation, and quantum meruit against the City, and a writ of mandate against PERS. A fourth employee association, Huntington Beach Police Officers' Association, filed a separate lawsuit against the City in 1998, which was consolidated with the City's action. In 1999, the trial court accepted a stipulation to add a fifth employee association, Huntington Beach Police Management Association, as an intervenor.

The City successfully moved for summary adjudication of all causes of action brought by the Intervenor except those based on quantum meruit. The City moved for judgment on the pleadings with respect to those causes of action; the trial court granted the motion but allowed the Intervenor an opportunity to file amended complaints alleging causes of action based on estoppel. The City's subsequent demurrer to the estoppel causes of action was sustained.³

IV. Discussion

A. The summary judgment on the mandate, breach of contract, and reformation causes of action was properly granted.

The Intervenor claim when the MOU's were negotiated in the early 1990s the true consideration bargained for was the retirement enhancements; the conversion

³ In November 1998, PERS was granted summary adjudication on the issue of whether it could be liable for damages. In March 1999, both PERS and Intervenor were granted summary judgment based on the trial court's determination that the Short-term Policy as well as the conversion benefits contained in the MOU's were lawful. The City appealed from both the judgment in favor of Intervenor (G025673) and the judgment in favor of PERS (G026268). Early in the litigation, the trial court had ruled that the City was required to exhaust its administrative remedies as promulgated by PERS, although the trial court allowed the litigation to go forward. Accordingly, and concurrently with the litigation, the City asserted its challenge to the Short-term Policy in an administrative hearing, where it was unsuccessful. The City then petitioned the Superior Court for a writ of administrative mandamus, which was denied. The City appealed (G028210). All three appeals were consolidated in this court and are being heard concurrently with this appeal.

Huntington Beach Management Employees' Organization and Huntington Beach Municipal Employees' Association reached a settlement with the City and are not part of this appeal.

options were merely the “preferred vehicles” for achieving those enhancements. They argue the trial court refused to consider the deposition testimony of the City’s designated “most knowledgeable representative,” who testified that during negotiations, the opportunity to receive an enhancement in pensions was one of the benefits promised; the employee representatives were seeking a retirement enhancement and that the conversion options were simply regarded as desirable means to achieve that goal.

The Intervenor contend this extrinsic evidence was admissible to explain the true meaning of the MOU under *Pacific Gas & Electric Co. v. Thomas Drayage, etc.* (1968) 69 Cal.2d 33. “[R]ational interpretation [of a written instrument] requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties. . . . If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, is ‘fairly susceptible of either one of the two interpretations contended for . . . ’ [citations], extrinsic evidence relevant to prove either of such meanings is admissible.” (*Id.* at pp. 39-40.)

Contrary to the Intervenor’s contention, the record reveals that the trial court considered the proffered evidence and rejected it because, rather than merely interpreting the language of the MOU, it added new terms. Parol evidence of an oral agreement that alters the language of an integrated written agreement is inadmissible. (*Pacific Gas & Electric Co. v. Thomas Drayage, etc., supra*, 69 Cal.2d at p. 40; *Banco Do Brasil, S.A. v. Latian, Inc.* (1991) 234 Cal.App.3d 973, 1009, fn. 49.) In ruling on the motion for summary judgment, the trial court stated, “[W]hat the [Intervenor] want to introduce is extrinsic evidence, not to explain its terms, but rather to alter them. [¶] . . . [¶] [P]arol evidence is not admissible to alter the terms of the contract, which is clear and non-ambiguous on its face. The Intervenor actually add terms, not clarify terms. . . . [T]he document is clear on its face and there’s nothing to establish intent at the time of contract negotiation that shows it’s not as set forth in the contract.”

We agree with the trial court’s determination. Under the heading entitled, “Public Employees’ Retirement System Reimbursement and Reporting,” the MOU’s provide that the City will pay the employee’s contribution to PERS and reimburse the amount to the employee. “The above PERS pickup is not base salary but is done pursuant to Section 414(h)(2) of the Internal Revenue Code.” The section continues, “Each permanent employee, eligible for service retirement, may have his/her PERS pickup reported as compensation for all or any part of the twelve (12) month period prior to his/her service retirement date upon written request to the Finance Director. Such modified reporting shall be limited to a maximum period of twenty-four (24) months preceding retirement pursuant to Government Code section 20022. [¶] . . . [¶] Each permanent employee, eligible for service retirement, may have his/her vacation accrual converted to salary for all or any part of the twelve (12) month period to his/her service retirement date upon written request to the Director of Finance. Such modified reporting shall be for a maximum of twenty-four (24) months.”⁴

The conversion of benefits to compensation is a PERS concept, and the MOU’s provide the retirement enhancements are to be provided through PERS. There is no provision relating to an alternative means of providing these enhancements. The language is not susceptible to the interpretation urged by the Intervenor.

The Intervenor contends the City should be mandated to elect the provisions of the new legislation (§ 20692) and amend its contract with PERS to provide the retirement conversion option. But this would be ordering the City to enter into a “judicially created collective bargaining agreement,” which is beyond the scope of mandate. (*Pomona Police Officers’ Association v. City of Pomona* (1997) 58 Cal.App.4th 578, 590.) “In light of the new economic considerations [inherent in the new legislation], a retirement

⁴ The HBFA agreement with the City provided that the PERS pickup could be reported as compensation for up to a 24 month period prior to retirement.

conversion option is a proper subject of negotiations for a new or revised collective bargaining agreement.” (*Id.* at p. 589.)

B. *The demurrer to the estoppel causes of action was properly sustained.*

The Intervenor argues the trial court improperly sustained the City’s demurrer to their estoppel causes of action because it did not accept their factual allegations as true. The Intervenor alleged that immediately before entering into each MOU, authorized representatives of the City promised that the represented employees would receive a total compensation that included the value of the promised enhancements as well as the value of the salary and other benefits promised. They claim the City should be estopped from denying these oral representations.

These allegations cannot support the estoppel sought by the Intervenor. The labor negotiations between the Intervenor and the City are governed by the Meyers-Milias-Brown Act (Gov. Code, §§ 3500-3510) (MMBA). “[T]he [MMBA] expressly provides that the [MOU] ‘shall not be binding’ but shall be presented to the governing body of the agency or its statutory representative for determination, thus reflecting the legislative decision that the ultimate determinations are to be made by the governing body itself or its statutory representative and not by others.” (*Bagley v City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.) Accordingly, nothing said or done in negotiations can bind the City unless it appears in the MOU that was adopted by the City’s governing body. (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 669.)

Furthermore, estoppel will not be applied against a governmental agency when to do so violates public policy. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493; *Page v. City of Montebello* (1980) 112 Cal.App.3d 658, 666-667.) Enforcing the alleged oral representations would violate the public policy of certainty and reliability in the meet and confer process set forth in the MMBA. (*San Bernardino Public Employees’ Association v. City of Fontana* (1998) 67 Cal.App.4th 1215, 1224.) And it would

circumvent the clear intent of the Legislature to invalidate the device of conversion benefit options as contemplated in the MOU under Government Code section 20692.

V. Disposition

The orders of the trial court granting summary adjudication in favor of the City and sustaining the City's demurrer are affirmed. Each party shall bear its own costs on appeal.

SILLS, P. J.

WE CONCUR:

RYLAARSDAM, J.

MOORE, J.